Supreme Court, U.S.
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No. 95-1225

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER,

V.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. McGILL, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF

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Question Presented For Review

Whether the doctrine of equitable tolling, presumed to apply to claims against the government as expressed in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), is applicable to toll the limitations period for tax refund claims under 26 U.S.C. §§ 6511 (a) and (b).

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a - 16a) is reported at 67 F.3d 260. The opinion of the district court (Pet. App. 17a - 30a) is reported at 859 F. Supp. 1283.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1995. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 6511 and 7422 of the Internal Revenue Code, 26 U.S.C. §1 et. seq., are set forth at Pet. App. 2-4.

STATEMENT

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On or about April 16, 1984, Mr. McGill, then aged 93, issued a personal check in favor of "Internal Revenue Service" in the sum of $7,000. The check did not indicate whether the $7,000 remittance was for income, gift or any other type of tax, or the

period for which the remittance applied. Mr. McGill did not file an income tax return for 1983 or for any of the five remaining years of his life, and the $7,000 remittance was the last he ever made.[1] When the check was received by the Internal Revenue Service, it was placed in a "suspense" account, and on July 5, 1991 was transferred into an "Excess Collection Account."

2. Beginning in the late 1970's, Mr. McGill's health began to deteriorate, and he developed the classic symptoms of senile dementia. He began to look dazed and disoriented, and would walk about the house naked, unaware of his nakedness. On one occasion, he went to the corner mailbox in a state of undress, and when confronted with his act, was unaware of what had happened. He could no longer remember recent conversations. He would begin to dial a telephone, and suddenly forget whom he was calling. He also developed troubles with his checkbook; bills for $100 and $400 would be paid with checks for $1,000 and $4,000. As a result of his dangerous forgetfulness, Respondent convinced Mr. McGill to give her

[1] IRS computer records indicate that an extension request was submitted with the $7,000 check, although this document has never been found.

son some checkwriting authority, and he agreed. It is likely, however, that he forgot this conversation as well.[2]

3. In response to Requests for Admissions, Petitioner admitted that Mr. McGill, who had long since retired, did not have an income in 1983 that could have resulted in a $7,000 tax liability.

4. Following Mr. McGill's death in 1988, Respondent discovered the $7,000 check in Mr. McGill's belongings. After she was appointed administrator of his estate, she wrote the IRS, requesting that the $7,000 be returned. The Service refused, noting that the taxes had been paid "more than three years prior to her claim."

5. Respondent thereafter commenced this tax refund action, alleging, inter alia, that the general rule enunciated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), viz., that the doctrine of equitable tolling applies against the

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2 As the district court litigation was determined upon the Petitioner's Motion for Summary Judgment, the foregoing factual recitation is derived from Respondent's Declaration.

government to the same extent that it applies against private parties, should apply with equal force to tax refund suits.[3]

6. In granting the Petitioner's Motion for Summary Judgment, the district court relied principally on the First Circuit's decision in *Oropallo v. United States*, 994 F.2d 25 (1993) cert. denied, 114 S. Ct. 705 (1994), and this Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990). In *Oropallo*, the First Circuit held that the limitations periods imposed by §6511 of the Internal Revenue Code and the doctrine of equitable tolling were "fundamentally inconsistent." In *Dalm*, this Court, limiting its holding in *Bull v. United States*, 295 U.S. 247 (1935) held that the doctrine of equitable recoupment could not be the sole ground for extending the limitations periods of §6511.

7. The court of appeals reversed, Judge Fernandez dissenting. In holding that equitable tolling could, in an appropri-

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3 The District Court litigation was decided upon Cross-Motions for Summary Judgment. The gravamen of the Respondent's Motion for Summary Judgment was that since the IRS had never assessed the $7,000 remittance, it was not a "payment" of tax, but remained in the nature of a refundable deposit.

ate case, toll the periods of limitations contained in §6511, the court noted that this Court's decision in *Irwin* was subsequent to, and effectively modified, this Court's decision in *Dalm*. In so doing, the court of appeals observed:

> "We think the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility." [Pet. App. 6a - 7a.]

The court of appeals concluded that a triable issue of fact existed as to Mr. McGill's incompetence. Accordingly, it remanded the case to the district court for further proceedings.

Discussion

Petitioners note that the court of appeal's decision conflicts with the Fourth Circuit's decision in *Webb v. United States*, 66 F.3d 691 (1995) petition for cert. pending, No. 95-1360, the First Circuit's decision in *Oropallo*, supra, and the Eleventh Circuit's decision in *Vintilla v. United States*, 931 F.2d 1444 (1991). [Pet. App. 12-19.] Petitioner's characterization of the conflict of decisions among the circuits is correct, with one exception. In *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226 (1993) the Eleventh Circuit appeared to assume, without comment, that equitable tolling does indeed apply with respect to tax refund claims, thus appearing to create a split between Eleventh Circuit decisions.

One cannot gainsay Petitioner's second reason for granting the Petition, that the conflict that presently exists among the circuits is with respect to an issue of considerable importance in the administration of the tax law, and that at present, whether a disabled taxpayer can or cannot avail him- or herself of equitable tolling is entirely a matter of "geographic happenstance." [Pet. App. 20.]

Respondent takes exception, however, to Petitioner's characterization of the number of post-*Irwin* cases brought by taxpayers claiming equitable tolling as a "substantial volume" of "frequent litigation." [Pet. App. 20.] No such "substantial volume" exists, and Respondent suggests that no such "substantial volume" is likely to develop.

Conclusion

With minor exception, Respondent concurs with Petitioner's stated grounds for granting its petition for a writ of certiorari, but rejects the assumption of a substantial volume of litigation on this issue if it is not.

Respectfully submitted,

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May 2, 1996